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BEFORE THE
POSTAL REGULATORY COMMISSION
WASHINGTON, DC 20268

Rules Pursuant to 39 U.S.C. 404a	:	Docket No. RM2013-4

COMMENTS OF TIME INC.
IN RESPONSE TO ORDER NO. 1739
(July 29, 2013)

Time Inc. submits comments in response to Order No. 1739, Notice of Proposed Rulemaking Establishing Rules Pursuant to 39 U.S.C. 404a (issued June 5, 2013) (hereinafter "NOPR"), in which the Commission proposes expedited procedures for complaints filed under § 3662 of the Postal Accountability and Enhancement Act ("PAEA" or "Act") that are based on alleged violations of § 404a of the Act.[1]

In 2006, the PAEA was enacted, adding to title 39 a new section, 404a, which prohibits the Postal Service, *inter alia*, from establishing regulations or standards that have the effect of harming competition. Section 404a(c) provides that "[a]ny party (including an officer of the Commission representing the interests of the general public) who believes that the Postal Service has violated this section may

[1] *See also* 78 Fed. Reg. 35826 (June 14, 2013) (publication of NOPR).

bring a complaint in accordance with section 3662," the PAEA's general complaint provision.[2]

Details of the NOPR

The NOPR proposes accelerated procedures for complaints based exclusively on alleged violations of § 404a. "The [404a] complainant will have the option of utilizing either the accelerated complaint procedures" or the standard complaint procedures. NOPR at 13.

If a complainant opts for the accelerated procedures:

- "the Commission [will] decide the case on the basis of only a complaint and answer, and in limited circumstances, a reply," *id*. at 11;
- "[t]he proposed accelerated complaint and pleadings procedures require the participants to produce at the outset of the case all the material and evidence on which they seek to rely," *id*. at 12;
- "the Postal Service shall file an answer to the complaint . . . within 20 days of service of the complaint," *id*. at 33 [proposed Rule 3033.8(a)];
- "[t]he Postal Service's answer . . . shall contain . . . [a]ll affidavits, declarations, documents, data and analysis upon which the Postal Service relies or intends to rely to support the facts alleged in the answer," *id*. at 32-33 [proposed Rule 3033.7(a)];

[2] Section 3662 provides that a complaint may be lodged with the Commission by "*any interested person*" (emphasis added), including a Public Representative, "who believes the Postal Service *is not operating* in conformity with" (emphasis added) chapter 36 (the ratemaking chapter of the Act) or a miscellany of other provisions from title 39 that include §§ 101(d) (apportionment of the costs of postal operations to users of the mail on a fair and equitable basis), 401(2) (USPS general rulemaking authority), 403(c) (prohibition of undue discrimination against any users of the mail), and 404a (unfair competition).

Whether any significance is to be attributed to the differences between "any *interested person*" in § 3662 and "[a]ny *party*" in § 404a(c), and between "*is* not operating in conformance with the requirements of . . . 404a" in § 3662 and "*has* violated this section" in § 404a(c), are questions that the Commission has not had occasion to address.

- "these accelerated procedures will require both the Postal Service and the complainant to present their cases for adjudication without discovery," *id*. at 14;
- "a potential intervenor may not expand the scope of the proceeding by addressing any issue(s) outside the scope of the complaint and answer," *id*. at 35 [proposed Rule 3033.11(b)];
- "[t]he Commission will issue a final order on a complaint no later than 90 days after the complaint is filed," *id*. at 37 [proposed Rule 3033.15(a)].

Statement of position

Adoption of this proposal would represent a drastic curtailment of the process afforded by the Commission in past complaint proceedings and of the process that the authors of § 3622 intended that provision to afford. Section 3662 provides that within 90 days of receiving a complaint the Commission shall *either initiate a proceeding* or dismiss the complaint, depending on whether it finds that the complaint raises material issues of fact or law. § 3662(b)(1)(A). The NOPR would transform the statutory period alloted to the determination of whether a proceeding is even warranted into a period in which a proceeding on the merits must be brought to completion. The "one major complaint proceeding that raised issues relating to unfair competition" that the Commission has conducted required two years of active litigation before the Commission was able to issue a final disposition.[3]

To achieve the dramatic acceleration sought by the NOPR, the proposed procedures have become heavily tilted in favor of complainants. The NOPR states:

> The Commission does not anticipate the absence of discovery under these accelerated procedures to appreciably affect the complainant's ability to make a compelling case on the merits. For the vast majority of

[3] NOPR at 10. The case was Complaint of GameFly Inc., Docket No. C2009-1.

> issues expected to arise under 39 U.S.C. 404a, complainants should have the information and documentation needed to support their claims well in advance of filing a complaint. For example, for complaints arising under section 404a(a)(1), the complainant should be in possession of the information and documents necessary to show how a Postal Service rule or regulation is causing competitive harm in the marketplace. Discovery from the Postal Service would not be expected to appreciably help the complainant demonstrate how the Postal Service's action causes competitive harm. The complainant is in the best position to directly establish such harm by reference to the effects the questionable rule or regulation has or will have on his or her business or other activities.

Id. at 12-13. But this statement is at odds with much that the NOPR says elsewhere about what will be required to show unfair competition under § 404a, in particular its recognition that § 404a requires more than a showing that a Postal Service policy or practice unduly discriminates against or harms individual competitors:

> In its application, the Commission anticipates, as a matter of policy, drawing upon the similarities between these provisions in 39 U.S.C. 404a(a)(1) and precedent developed under federal statutes concerning unfair methods of competition . . . Most commonly, claims of unfair competition are reviewed under the rule of reason analysis. This analysis focuses on whether the behavior unreasonably restrains competition. In making such a determination, the decision maker reviews the "anticompetitive effects" of the action. These anticompetitive effects must "harm the competitive process and thereby harm consumers. . . . [H]arm to one or more competitors will not suffice."[4]

[4] Id. at 7 (footnote omitted) (quoting *United States v. Microsoft Corp*., 253 F.3d 58 (D.C. Cir. 2001)). The Commission is correct that the rule of reason analysis represents the prevailing view of how to deal with claims of unfair competition under federal law and that this rule imposes on the complainant the burden of making an empirical showing of "anticompetitive effect on customers and markets." As recently as June 17, 2013, the U.S. Supreme Court rejected the urging of the Federal Trade Commission "to hold that reverse payment settlement agreements are presumptively unlawful and that courts reviewing such agreements should proceed via a 'quick look' approach, rather than applying a 'rule of reason.'" *FTC v. Actavis, Inc*. _____ U.S. __, slip op. at 20 (July 17, 2013). Citing California Dental Assn. v. FTC, 526 U. S., at 775, n. 12 (1999) ("Quick-look analysis in [footnote continues]

But even were the Commission correct in believing that "the absence of discovery under these accelerated procedures [is unlikely to] appreciably affect the complainant's ability to make a compelling case on the merits" (*id*. at 12), that fact would give no comfort to the Postal Service or to users of the mail other than the complainant, whose due process right to fully understand the basis of the complainant's case is no less than any due process right of the complainant. Contrary to the assumption apparently made in formulating the proposed rules, there is no reason to assume that the relevant facts in cases of alleged unfair competition will be simple or uncontroversial, or that the number of interested parties will be small. Also, as discussed further below, the potential remedies for unfair competitive practices tend to be wide-ranging and unpredictable in their impact on Postal Service plans and operations and on mailers who may not be parties to the proceedings.[5]

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effect" shifts to "a defendant the burden to show empirical evidence of procompetitive effects"); and 7 Areeda ¶1508, at 435–440 (3d ed. 2010), the Court stated:

> We decline to do so. In *California Dental*, we held (unanimously) that abandonment of the "rule of reason" in favor of presumptive rules (or a "quick-look" approach) is appropriate only where "an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets." 526 U. S., at 770; id., at 781 (BREYER, J., concurring in part and dissenting in part).

Slip op. at 20.

[5] For the presumed simplicity of facts, see the statement quoted immediately above that "[t]he complainant is in the best position to directly establish such harm by reference to the effects the questionable rule or regulation has or will have on his or her business or other activities" (NOPR at 13). The NOPR states at 14 that "section 404a complaints are expected to involve a limited number of participants."

One of the rare instances in which an alleged violation of § 404a was raised in a Commission proceeding was in Dockets No. MC2012-14/R2012-8, Valassis NSA. The Commission found that § 404a was inapplicable to the NSA proceeding, but a review of the [footnote continues]

Given such a high probability of complexity in unfair competition cases, the proposed procedures would create a likelihood of inadequately considered and unjust outcomes. The Commission's proposal therefore poses a gratuitous threat of financial harm to a Postal Service that is already struggling to avert fiscal collapse. It also poses a particular threat to any segments of the mailing, publishing, and advertising industries which may have been among the beneficiaries of allegedly "anticompetitive" Postal Service pricing policies (whether these policies be manifested through alleged "subsidies" to "underwater" products, or through "excessively" high, or low, passthroughs of workshare cost savings, or "excessively" favorable terms in Negotiated Service Agreements, or even through differences in relative markups over cost which a potential complainant may believe to be unfair or imprudent). Past experience suggests that complaints of unfair competition on the part of the Postal Service are most likely to conclude with a petition that rates for some category of mail used by competitors of the complainant be raised, or that services for such categories of mail be reduced or withdrawn.

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arguments that were raised lends no support to the assumption that in § 404a cases the facts are likely to be simple or the number of interested parties limited. See Comments Of National Newspaper Association, Inc. on the Postal Service's Proposed Negotiated Service Agreement with Valassis, Inc. (May 23, 2012) at 5-6; and Comments of the Public Representative in Response to Order No. 1330 (May 24, 2012), at 7.

The potential for remedial complications that impact mailers who are not parties to the proceeding and cannot be adequately considered within the bounds of a 90-day schedule is illustrated by the GameFly Complaint, which is discussed further below.

Discussion

1. The PRC's § 3622 complaint proceedings bear neither a legal nor a circumstantial resemblance to FCC formal complaint proceedings

In support of the NOPR, the Commission points out that the FCC has adopted expedited procedures for that agency's formal complaint proceedings. But the relevant commonalities between the Commission's complaint proceedings and the FCC's formal complaint proceedings are slight.

The FCC, as required by statute, conducts numerous formal complaint proceedings to resolve disputes between telecommunications common carriers that it regulates and their customers. The FCC is required by 47 U.S.C. § 205 to provide a "full opportunity for hearing" in such proceedings--i.e., the level of due process that is required by the Administrative Procedure Act for "formal adjudications." The FCC is also required by the Telecommunications Act of 1996 to issue a final decision in most of its formal complaint proceedings within a specified time period, ranging from 90 days to 5 months from the date of filing. The expedited FCC procedures referred to by the NOPR were adopted in compliance with those statutory deadlines, which were aimed at breaking a regulatory logjam of cases that were not being resolved within a previously established statutory period of 12 or 15 months. Complainants who choose to file a formal complaint with the FCC have the alternative of bringing a case in federal district court.[6]

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[6] *See* FCC 96-460, Implementation of the Telecommunications Act of 1996: Amendment of Rules Governing Procedures to Be Followed When Formal Complaints Are Filed Against Common Carriers (Adopted November 26, 1996), ¶ 1. For option to file suit in federal court, see *id*., ¶ 16.

In 1993, the General Accounting Office (GAO) reported to Congress concerning the FCC [footnote continues]

The Commission's complaint proceedings always involve a dispute between the entity which it is its primary mission to regulate, the U.S. Postal Service, and one or more parties that may appear in the role of a mail user, a USPS competitor, an advocate for the public interest, or an intended beneficiary of the public policies of the PAEA. The PAEA's complaint provision does not by its terms require the opportunity for a "full hearing" or "hearing on the record" and thus does not impose the due process requirements applicable to APA formal adjudications. Yet the PAEA's complaint provision does require initiation by a party other than the Commission, does make compliance with the law its standard for Commission action, and does require the Commission to impose mandatory remedies when it finds a complaint justified, and even authorizes imposition of punitive remedies in some circumstances. In the respect of having these markedly adjudicative

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"complaint process to resolve pricing and other disputes between customers and common carriers." Telecommunications: FCC's Handling of Formal Complaints Filed Against Common Carriers, GAOAWED-93-83 (March 1993). At that time, the law required that such "tariff" complaints "must be resolved within 12 months of filing, or 15 months if the case involves facts of 'extraordinary complexity.'" The report found (at 2) that:

> Over 40 percent (207 of 465) of the formal tariff complaints resolved by FCC during the past 4 years were not resolved within the time frames established by law. In addition, as of the end of fiscal year 1992, over 80 percent of the pending tariff complaints (at least 425 of 520) were already older than the legal limitations allowed.
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> . . .
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> At the end of fiscal year 1992, a total of 670 formal complaints (520 tariff and 150 nontariff) were pending at FCC. A significant increase of complaints in recent years has overburdened FCC in processing them.

In the year preceding passage of the Telecommunications Act of 1996 (July 1, 1964–June 30, 1965), the FCC employed sixteen hearing examiners. Counting only common carrier service cases, it had 76 pending formal complaint dockets at the beginning of the year, opened an additional 29 during the year, and had 49 pending at the end of the year. Federal Communications Commission 31st Annual Report: For the Year 1965 (GPO: 1965), at 13, 15.

characteristics but imposing no particular standard of due process (i.e., lacking a hearing requirement), § 3662 is unusual for administrative law of its period and quite dissimilar from FCC formal complaints.[7] And, of course, far from having a backlog of complaints under section 404a, *the Commission has never conducted even one complaint proceeding under that provision*.[8]

The FCC's procedures for formal complaints provide for three rounds of limited written discovery (47 C.F.R. § 1.729) and include provisions for diverting issues to a slower supplemental procedural track when the due process appropriate to formal adjudications so requires, such as when a complainant seeks retrospective relief (i.e., monetary damages) (47 C.F.R. § 1.722). But the Commission's proposed expedited procedures provide for no discovery and no bifurcation of proceedings. The Commission's proposed procedures simply contemplate resolving all disputed issues and issuing a final order granting appropriate relief within 90 days of the filing of the complaint "on the basis of only a complaint and answer, and in limited circumstances, a reply" (NOPR at 11). The Commission's answer to the objection

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[7] *See* Docket No. RM2008-3, Notice and Order of Proposed Rulemaking Establishing Rules for Complaints (Order No. 101) (issued August 21, 2008), at 6, n. 1 ("The law provides the Commission with discretion to determine the form and procedures to use for dealing with the variety of complaints it may hear under 39 U.S.C. section 3662 ('Any interested person … may lodge a complaint with the Postal Regulatory Commission in such form and manner as the Commission may prescribe')") [incorporated by reference in Docket No. RM2008-3, Order Establishing Rules for Complaints and Rate or Service Inquiries (Order No. 195) (issued March 24, 2009), at 2, n. 1].

[8] *See* NOPR at 10 ("Since the passage of the PAEA and the implementation of the Commission's PAEA complaint rules, the Commission has conducted one major complaint proceeding that raised issues relating to unfair competition: Docket No. C2009-1, GameFly Inc. (GameFly). . . . [T]he GameFly complaint did not directly raise issues related to 39 U.S.C. 404a").

that 90 days may not suffice is that, with the application of discipline, it will make them suffice:

> Under these procedures, it is the Commission's intention to issue a final decision on the merits of a complaint filed using these accelerated procedures prior to the deadline in 39 U.S.C. 3662(b)(1) for making a finding that the complaint raises a material issue of fact or law; that is, within 90 days of the date the complaint is filed. As a result, if adopted as final rules, the Commission must strictly enforce all deadlines as set forth in the proposed rules. Failure to adhere to such deadlines may result in adverse action. The Commission's strong commitment to prompt resolution of accelerated complaints and their effective foreclosure of avenues for delaying litigation may foster and even encourage settlement or informal resolution of disputes.

NOPR at 12.

If one envisages, as one must in order to assess the likely effect of adopting the proposed rules, the existence of one or more parties who did not lodge a § 404a complaint under the old procedures but might do so under the new ones, it is fair to say that such parties could include some who have a case to make that is quite plausible on its face but vulnerable upon deeper inquiry--a case that is, in a word, specious. All that such a party would have to fear from an "adverse action" in a complaint case would be loss of the case, leaving it no worse off than when it began. Such a party would, of course, be as one with the Commission in its "strong commitment to prompt resolution of accelerated complaints" and have no reason to engage in delaying tactics. With such a party in mind and in view of the record of *zero* 404a proceedings having been lodged under the existing procedures, it must be asked whether it is desirable in all cases to "encourage settlement or informal resolution of disputes." A procedure that reliably recognizes and redresses meritorious claims will certainly encourage the informal resolution of meritorious

claims. But a procedure that gives specious claims a fair chance of prevailing will encourage the informal resolution of specious claims. Is that something that should be encouraged?

It is possible by considering the remedial complexities that have challenged the Commission in the GameFly Complaint to formulate a rough impression of the difference it makes that Commission complaint proceedings involve disputes between the national monopoly which it is the Commission's primary function to regulate and one or more of its innumerable ratepayers, whereas FCC complaint proceedings involve disputes between one among thousands of privately owned telecommunications common carriers operating under FCC regulation and one or more of their customers. Although in GameFly it found not a case of unfair competitive practices affecting an entire market but a fairly straightforward case of unjustified discrimination between two similarly situated mailers, the Commission has faced and continues to face extremely complicated and subtle difficulties in trying to devise a remedy that does not produce unacceptable ramifications for mail and mailers that played no role in the Commission's considerations of the case.[9] The remedial complications in a case where it does not suffice for a complainant to prove that the Postal Service has caused "harm to one or more competitors," where it must be proved that its actions "harm the competitive process" (NOPR at 7), are not likely to prove more amenable to thorough analysis on a 90-day schedule than they have done in GameFly.

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[9] See Docket No. C2009-1R, Complaint of GameFly, Inc., Order on Remand (Order No. 1763) (issued June 26, 2013); and United States Postal Service Motion for Reconsideration and Clarification of Order No. 1763 (July 25, 2013).

2. The concerns expressed by the Commission regarding irreparable harm are unfounded, and its proposed method of alleviating those concerns would in any event be impermissible

The Commission expresses concern that, because of the possibility of delay inherent in its existing complaint procedures, "at least for some businesses, Postal Service violations of section 404a could cause irreparable harm and threaten the livelihood of certain companies or individuals." NOPR at 11. Neither the basis for the Commission's concern about irreparable harm to potential § 404a complainants due to the current procedures, nor the basis for its lack of concern about possible irreparable harm to the Postal Service or other stakeholders in the event that it adopts the proposed expedited procedures, is explained in the NOPR.

Since the Commission has never conducted a single complaint proceeding under § 404a, its reasons for singling out § 404a complainants (as opposed to complainants under any other provision of the Act) are not apparent. Nor does it explain its reasons for singling out irreparable harm to complainants as a cause for concern (as opposed to irreparable harm to the Postal Service or to mailers other than complainants, who presumably are potential intervenors). Yet, in view of the fact that the Commission's proposal is to move on an expedited schedule to a final decision, and in view of its sweeping remedial powers (which include permanent reduction of Postal Service revenues or permanent increases in postal rates of mailers other than the complainant(s)), the potential for irreparable harm to the Postal Service and mailers other than the complainant(s) is clearly inherent in expedited procedures.[10]

[10] In litigation in federal courts, the issue of irreparable harm ordinarily arises in connection [footnote continues]

3. The unsettled state of both the jurisdictional reach and the substantive content of § 404a make that provision an especially poor candidate for fast-track procedural treatment

At this date, both the jurisdictional scope and the substantive meaning of § 404a are in an unsettled state under the Commission's precedents.

a. Mutually contradictory Commission statements about what § 404a applies to leave its jurisdictional scope in doubt

As to § 404a's jurisdictional scope, the Commission has never conducted a complaint proceeding in which a violation of § 404a was alleged, nor has it found the Postal Service to have violated § 404a in any other type of proceeding. In rejecting one allegation of such a violation in a proceeding to approve an NSA, and in commenting in Order No. 536 (Workshare Order) and in the instant NOPR on the applicability of § 404a, it has given inconsistent answers to the question of what issues § 404a applies to.

The NOPR, at 3-5, discusses portions of the legislative history of the PAEA that would tend to support the conclusion that § 404a applies exclusively to the Postal Service's competitive products and operations.[11]

But in its Order Adopting Analytical Principles Regarding Workshare Discount Methodology (Order No. 536) (issued September 14, 2010), at 24-25, a careful

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with an application for an interlocutory order to maintain the status quo pending a final disposition on the merits. It is not clear that moving swiftly to a final judgment on the merits is an appropriate means for protecting one party to a litigation from irreparable harm.

[11] The Commission quotes a Senate Report on a "precursor bill" to the PAEA as counting § 404a among "a number of provisions the Committee believes are necessary to ensure that the Postal Service competes fairly with the private sector, particularly when offering products and services classed as competitive." And it quotes a House Report as stating that “unlike the unconstrained pricing flexibility recommended by the President’s Commission for competitive products, [the precursor version of § 404a] imposes limited but important controls to protect the public interest from unfair competition.” NOPR at 5.

analysis of the interrelations of the various statutory ratemaking categories under the PAEA, the Commission lists § 404a among "sections of the PAEA that articulate or imply standards governing market dominant prices."

In yet another context, Dockets No. MC2012-14/R2012-8, Valassis NSA, the Commission rejected contentions that the proposed NSA "violates 39 U.S.C. 404a because it 'precludes competition' and constitutes an 'unfair competitive advantage' for the Postal Service," stating the following reasons:[12]

> Section 404a is inapplicable to the NSA. It bars the adoption of rules or regulations, promulgated by the Postal Service pursuant to 39 U.S.C. 401(2) [USPS general rulemaking authority], that have the effect of precluding competition unless the Postal Service demonstrates that the rule does not create an unfair competitive advantage for itself. Violations of section 404a are subject to complaint pursuant to 39 U.S.C. 3662. The NSA is not a rule or regulation promulgated pursuant to chapter 4 of title 39. The Postal Service's Request was filed pursuant to 39 U.S.C. 3622 and 3642 and related Commission rules.

These positions appear to be mutually irreconcilable. It is unclear how § 404a can simultaneously be:

(i) exclusively applicable to the Postal Service's competitive products and operations;

(ii) "among sections of the PAEA that articulate . . . standards . . . governing market dominant prices"; and

(iii) a bar to "the adoption of rules or regulations, promulgated by the Postal Service pursuant to 39 U.S.C. 401(2) [the provision which grants the Postal Service general rulemaking authority], that have the effect of precluding competition,"

as distinguished from

a bar to the granting of a request, "filed pursuant to 39 U.S.C. 3622 and 3642 [the ratesetting provisions of the Act] and

[12] Order Approving Addition Of Valassis Direct Mail, Inc. Negotiated Service Agreement To The Market Dominant Product List (Order No. 1448) (issued August 23, 2012), at 40.

> related Commission rules, [that has the effect of precluding competition]."

b. The proposed procedures cannot accommodate the development of a factual record and appropriate legal argument commensurate with the probable complexity of facts and issues in a § 404a case

As to the substantive meaning of § 404a, the Commission's discussion of its proposed expedited procedures in the NOPR reveals the extreme difficulty of keeping clear the distinction between (a) unfair competition based on misuse of the Postal Service's legal monopoly and its statutory regulatory authority, resulting in harm to competition or the marketplace, in violation of § 404a, and (b) undue discrimination against a user of the mails, who may also happen to be a competitor of the Postal Service in the same or another market, in violation of § 403(c).[13]

In the NOPR, the Commission appears at times to have the distinction clearly in mind, as when it states early in its discussion:

> The Commission notes that to succeed on a claim under 39 U.S.C. 404a(a)(1), the complainant must demonstrate that Postal Service action or inaction "precludes competition," or "establish[es] the terms of competition." . . . [H]arm to one or more competitors will not suffice."

NOPR at 7 (*quoting United States v. Microsoft Corp.*, 253 F.3d 58 (D.C. Cir. 2001) (footnotes omitted)).

The Commission's discussion of claims of unfair competition early in the NOPR suggests that it understands that such claims generally involve complex

[13] Contentions about whether the Commission correctly apprehended the significance of "harm to competitors" as opposed to "harm to competition" in determining what constitutes "harm to the marketplace," i.e., unfair competition, figure in *Newspaper Ass'n. of America v. Postal Regulatory Commission*, No. 12-1367 (D.C. Cir.) (currently awaiting oral argument). See Petitioner's Brief at 21 (February 11, 2013), and Intervenors' Brief at 13 (February 26, 2013).

issues of fact and place a difficult burden of proof on the complainant. The Commission implies that its proposed 404a complaint procedures will be designed on the basis of this understanding:

> Just as in 39 U.S.C. 404a(a)(1) cases where the burden is on the complainant to show that the conduct "precludes competition," or "establish[es] the terms of competition," in federal unfair competition cases, the burden is on the plaintiff to demonstrate that the conduct has the requisite anticompetitive effect. If such a showing is made, the defendant "may proffer a 'procompetitive justification' for its conduct." Similarly, under 39 U.S.C. 404a(a)(1) cases, the Postal Service must show that its conduct "does not create an unfair competitive advantage."
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> In unfair methods of competition cases, the procompetitive justification must be "a nonpretextual claim that its conduct is indeed a form of competition on the merits because it involves, for example, greater efficiency or enhanced consumer appeal—then the burden shifts back to the plaintiff to rebut that claim." If the defendant's procompetitive justification stands unrebutted, then the "plaintiff must demonstrate that the anticompetitive harm of the conduct outweighs the procompetitive benefit."

NOPR at 7-8 (footnotes and internal citations omitted).

When the Commission comes to explaining the extremely abbreviated procedures it proposes, in which the Postal Service as respondent is given no opportunity for discovery and is limited to a single written answer before "the Commission . . . issue[s] a final decision on the merits of a complaint" (NOPR at 12), it does not indicate how the complexity of issues and facts, or the potentially shifting burdens of proof associated with cases of alleged unfair competition, can conceivably be accommodated by these procedures.

Conclusion

The proposed expedited procedures for § 404a complaints would have the unfortunate effect of inviting potential 404a complainants to view the § 3662 complaint provision as a lottery in which the chance of a jackpot is worth the relatively low price of a ticket. A complainant could assemble its case at leisure, file it, and await the outcome free from discovery, cross- or counter-claims, or expansion of the issues as it choose to frame them in its complaint. Beyond the risk of not receiving a favorable decision in 90 days, it would incur no risk at all. The Commission has no power to sanction private parties.

The NOPR fails to substantiate any positive effects to be expected from the proposal that may be weighed against its probable deleterious effects. The proposal is based on a factitious comparison of the regulatory functions of the PRC and the FCC. It fails to consider the magnitude of the risks of harm to the Postal Service, to mailers other than the complainant, and to the economy in general from inadequately supported and considered decisions that could result from the radically truncated procedures that the Commission proposes. Nor is it based on any evidence of a need or an expressed demand from any quarter for such procedural change. On the contrary, the fact that no complaint has ever been filed with the Commission under section 404a suggests that the Commission has devised a remedy for a problem that does not exist.

The only result that can be predicted with confidence were the proposed procedures to be adopted is that more complaints would be filed than would

otherwise be the case. That, in itself, is not even a dubious good. It is not a good at all and should not be an objective of Commission policy.

Respectfully submitted,

s/_____
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